In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1479

SYLVESTER MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Eastern District of New York, petitioner and nine co-defendants were convicted of conspiracy to import narcotics into the United States and to buy, sell, conceal and facilitate the transportation, concealment and sale of narcotics known by them to have been illegally imported, in violation of 21 U.S.C. 174. Petitioner was sentenced to imprisonment for ten years and fined $10,000. The court of appeals affirmed (Pet. App. A).

In January 1968, co-conspirator Estrada, a government witness, was a bartender in a Manhattan bar. At that time defendants Flores and Torrado approached him about working with them in the narcotics business, and he agreed to do so (Tr. 484-486). Shortly thereafter, Flores introduced Estrada to petitioner, telling Estrada to "take care" of him (Tr. 494, 498). Petitioner was a regular visitor to the bar, coming to see Flores or Torrado two or three times a week late in the evening. Petitioner would also telephone Flores or Torrado two or three times a day (Tr. 498-500). Flores opened an office at petitioner's place of business and sold cocaine and heroin there when the bar was "hot" (Tr. 502-505).

Estrada's wife worked at the bar during February and March of 1968. She testified that most of the business there was in narcotics (Tr. 1342-1343). She saw petitioner there four or five times a week and talked with him on the telephone almost daily. Torrado also told her to take good care of petitioner (Tr. 1347-1349). About a half dozen times she saw petitioner bring money in a paper bag to Torrado and Flores. They would count the money at a table in the rear of the bar, after which they would sniff cocaine. Once she heard an argument among them; petitioner was threatening not to pay for his "stuff," because he said it was no good (Tr. 1350-1352).

In March 1968, Estrada went with Torrado to Florida to obtain cocaine and heroin (Tr. 517). They needed more money and Estrada returned to New York, where he met with Flores and another defen-

dant in petitioner's office (Tr. 514-517). Estrada told Flores in the presence of petitioner that they needed $15,000 to buy three kilos of cocaine. Petitioner gave Estrada $13,000 to cover the purchase of the cocaine and their expenses (Tr. 527-531). Later that month Torrado bought one and a half kilos of cocaine in Florida for $10,500 (Tr. 560-565). Another co-conspirator, Gomez, testifying for the government, estimated that the value of the narcotics sold by this group averaged $100,000 to $150,000 weekly (Tr. 2099).

1. Contrary to petitioner's contention (Pet. 4-7), there is no conflict between the trial court's instruction that the evidence failed to show possession of narcotics and the statement of the court of appeals that the evidence showed petitioner's knowledge of illegal importation. The evidence showed that petitioner, who was in almost daily contact with other members of the conspiracy, frequently brought money to them in paper bags, that petitioner and the others discussed narcotics purchases and that on one occasion petitioner put up a large sum of money for a purchase of cocaine in Florida. This amply established his participation in the conspiracy, even though there was no direct evidence of petitioner's actual possession of narcotics at any particular time. As the court of appeals correctly found (Pet. App. A, 7a): "From his daily association with the leaders of the conspiracy and his continuous large-scale transactions with them, we think the jury was entitled to find Moore intimately involved with the conspiracy and

fully knowledgeable that the narcotics were illegally imported." Cf. *Turner* v. *United States*, 396 U.S. 398, 416-417.[1]

2. Petitioner also seeks review on the grounds that he was sentenced under 21 U.S.C. (1964 ed.) 174 and 26 U.S.C. (1964 ed.) 7273(d), repealed prior to his trial, and not under the Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1242, 21 U.S.C. 801-966. Petitioner's contention (Pet. 9-12), however, is purely speculative and is not supported by the record, for petitioner's sentence of ten years' imprisonment exceeded the mandatory minimum under the old law (five years), and accordingly the mandatory minimum did not affect his sentence. Cf. *United States* v. *Bates*, 429 F. 2d 557, 560 (C.A. 9), certiorari denied *sub nom. Isbell* v. *United States*, 400 U.S. 831, and *Green* v. *United States*, 400 U.S. 916. It is nevertheless our contention that the repealed sentencing provisions remain fully effective as to violations committed prior to repeal, by reason of both the general saving statute, 1 U.S.C. 109, and the special saving clause of the new Act, Section 1103(a), 84 Stat. 1294. See *United States* v. *Fiotto*, 454 F. 2d 252 (C.A. 2), certiorari denied, May 15, 1972, No. 71-1114.

The decision below is not in conflict with *United States* v. *Stephens*, 449 F. 2d 103 (C.A. 9). That case involved the question whether 26 U.S.C. (1964

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[1] The claimed inaccuracies (Pet. 7-9) in the summary of the evidence by the court below do not change the crucial fact that petitioner played a significant role in the conspiracy.

ed.) 7237(a), which prohibited probation or suspension of sentence, still applied to offenses committed prior to the new Act's effective date. The Ninth Circuit there concluded that the saving clauses referred to above did not pertain to such post-judgment matters as probation and suspension. The issue sought to be raised in the present case concerns not probation or suspension but, like *Fiotto*, the minimum penalty imposed by the old law. The court in *Stephens* recognized that this question was different from the issue it was required to decide. See 449 F. 2d at 104.[3]

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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[3] While we did not oppose the petition for a writ of certiorari in *Bradley, et al.* v. *United States*, No. 71-1304, certiorari granted, June 12, 1972, that case raises the different question of eligibility for parole with respect to which there was a conflict between the First Circuit decision in *Bradley* and the implications of the Ninth Circuit decision in *Stephens*.

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